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Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1997

BARRY BRADSHAW,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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57 pp

QUESTIONS PRESENTED

1. Whether, with the exception of enclaves acquired pursuant to Article I, § 8, cl. 17 of the United States Constitution, the public land within the State of Nevada is property belonging to the Federal Government.

2. Whether the Federal Government has jurisdiction and municipal sovereignty "without limitation" over such land pursuant to Article IV, § 3, cl. 2 of the United States Constitution.

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case.

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Petitioner, Barry Bradshaw, respectfully petitions for a writ of certiorari to review the opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on July 18, 1997 in order to resolve the Federal Government's claim that the public land ceded by the act of statehood to the people of the State of Nevada is property belonging to the Federal Government, and of the corollary claim to jurisdiction without limitation over that land pursuant to Article IV, § 3, cl. 2 of the United States Constitution.

OPINIONS BELOW

The Memorandum of the Ninth Circuit Court of Appeals that gives rise to this petition is not reported and is reproduced in the Appendix filed herewith ("App") at 1a. The opinion of the District Court in this case is unreported and is reproduced in the Appendix at 3a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its Memorandum on July 18, 1997. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Treaty of Guadalupe Hidalgo, 9 Stat. 922:

> To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of Particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to

> exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, magazines, Arsenals, dockyards, and other needful Buildings. . . .

United States Constitution, Article IV, § 3, cl. 2:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State.

STATEMENT OF THE CASE

The United States of America, claims to be the owner of non-enclave lands within the boundaries of the State of Nevada, based on the Treaty of Guadalupe Hidalgo, 9 Stat. 922. By reason of such claimed ownership, the United States of America claims jurisdiction over such lands pursuant to Article IV, § 3, cl. 2 of the United States Constitution. Rules and regulations enacted and enforced by an agency of the Federal Government, pursuant to that claim, require the Bradshaws to obtain a permit to graze their cattle on such lands. Bradshaws deny the claim of ownership and, thus, the jurisdiction of the Federal Government. Accordingly, they refuse to obtain the permit or to otherwise submit to the claimed jurisdiction of the Federal Government.

The Bradshaws are the owners of the Bradshaw Ranch which is nearly surrounded by such claimed lands. The Bradshaw family, and its predecessors, have grazed cattle on the adjacent claimed land continuously since 1867. The Bradshaws have

vested water and forage rights in, and range improvements on, such lands. During the years since passage of the Free Roaming Wild Horse and Burrow Act, the Federal Government, through its administrative agencies, has allowed approximately 2,000 non-indigenous feral horses to graze year round on the subject lands so as to take, by overgrazing, the forage on the subject lands and appropriate Defendant's water, thereby damaging the forage yielding capacity of such lands.

The Federal Government commenced the underlying action claiming that:

> 1. . . . , As sovereign, (it) owns land within White Pine County, Nevada.
>
> 2. The Secretary of the Department of Agriculture . . . has been delegated the authority by Congress to administer National Forest System Lands. Federal law and regulation require a permit prior to placing livestock on such land.
>
> 3. Bradshaws allowed livestock to be on such land without a permit.

The District Court's Order which grants summary judgment recites the conclusion essential to its holding:

> Defendants' answer (#2) to plaintiffs complaint concedes the United States became owner of the land in question by treaty in 1848. When that happened, the Property Clause (U.S. Const. art. IV, section 3, cl. 2) attached to the land, which "power over the public lands thus entrusted to Congress is without limitation."

Kleppe v. New Mexico, 426 U.S. 529, 539 (1976) (citing *United States v. San Francisco*, 310 U.S. 16, 29 (1940)). This holding ignores the affect of the cession to the State of Nevada of eminent domain and municipal sovereignty and jurisdiction that occurred at the time of the statehood of Nevada. It further ignores the fact that this Court has ruled that Article IV, § 3, cl. 2 does not extend to the land at issue herein.

None of the enumerated powers of Congress contained in Article I of the United States Constitution are invoked to support the referenced regulations.

Matters of historical fact: Great Britain established sovereignty over the region of North America by discovery and conquest, and title to all vacant land was vested in the crown. *Johnson v. Mc'Intosh*, 21 U.S. (8 Wheat.) 543 (1823). After the American Revolution, title to the public land "passed definitively to the States" *id.* at 583. As a condition of ratifying the Articles of Confederation the six states without western lands insisted on an agreement that the landed states divest themselves of their western lands. The landed states agreed to surrender their lands (the Northwest Territory) to the Confederation for the purpose of forming new and independent states.

Congress adopted The Northwest Ordinance of 1787 1 Stat. 50 (Aug. 7, 1789) to establish territorial governments, to admit new states and to apply the proceeds of sale of the lands to the Revolutionary War debt. The Ordinance also provided that states were to be formed in the Territory and that those future states would be admitted "on an equal footing with the original states in all respects whatever." *Id.* Article V, Article IV, § 3, cl. 2, was added to the Constitution to give congress the power to implement this Ordinance.

The power of the Federal Government to acquire title to

property within states of the Union was created through the adoption of the Enclave Clause, which allows the Federal Government to "exercise exclusive legislation over all Places purchased by the Consent of the Legislature of the State" for "the Erection of Forts, Magazines, Arsenals, Dock Yards and other needful Buildings." United States Constitution, Article I, § 8, cl. 17. The thirteen original states continued to own all public lands within their boundaries following ratification of the Constitution in 1789. By 1796, Vermont, Kentucky and Tennessee also had been admitted to the Union, each owning all the land within their boundaries.

Opinions of this Court confirmed that new states took all land upon statehood:

> That the original states acquired by the revolution the entire rights of soil, and of sovereignty, is most certain. And if it be true, that Alabama was admitted on an equal footing in regards to the rights of soil with the original states, she can hold the high lands equally with the land covered by navigable water, and so can nine other states equally hold, to the utter destruction of all claim to the lands heretofore indisputably recognized as belonging to the United States, as being a common fund of the Union. *Mayor and Aldermen of the City of Mobile v. Eslava*, 41 U.S. 234 (1842).

> We think a proper examination of this subject will show, that the United States never held any municipal sovereignty, jurisdiction, or right of soil in and to the territory, of which Alabama, or any of the new states were

> formed except for the temporary purposes, and to execute the trusts created by the acts of the Virginia and Georgia legislatures, and the deeds of cession executed by them to the United States, and the trust created by the treaty with the French republic, of the 30th of April, 1803, ceding Louisiana. . . . Alabama is therefore entitled to the sovereignty and jurisdiction over all the territory within her limits, subject to the common law, to the same extent that Georgia possessed it before she ceded it to the United States. To maintain any other doctrine is to deny that Alabama has been admitted into the union on an equal footing with the original states, the constitution, laws and compacts, to the contrary notwithstanding. *Pollard v. Hagen*, 44 U.S. 212, 222.

In 1856 this Court in a lengthy, detailed and well reasoned opinion held that Article IV, § 3, cl. 2, jurisdiction was confined to the Northwest Territory and did not apply to newly acquired lands. *Dredd Scott v. Sandford*, 60 U.S. 393 (1856). (The State of Nevada is included in such newly acquired lands).

Such was the state of the applicable law when by its act, 13 United States Statutes at Large (1864), pp. 30-32, Congress authorized the formation of the constitution and state government of the State of Nevada. Section 2 of that act defined the boundaries of said State and provided that "that the said State of Nevada shall *consist of all territory* included within the following boundaries to wit: . . ." The lands within the legal description, set forth thereinafter, were ceded to the people of the State of Nevada by the act of statehood and comprise all of the lands at issue herein. None of the lands surrounding

Bradshaw's ranch are Article I, § 8, cl. 17 enclaves nor were they reserved prior to statehood. There was no reservation of ownership, municipal sovereignty, or jurisdiction over such lands by the Federal Government.

The act of statehood places the state, all territory within the state's boundaries, and the people of the state under the United States Constitution. Federal jurisdiction "without limitation" over the state, its territory and its people is completely antithetical to the allocation of powers set forth in the United States Constitution.

REASONS FOR GRANTING THE WRIT

I.

THIS IS A CASE OF FIRST IMPRESSION.

This issue (who owns the dry, public uplands of the State of Nevada) has not been specifically litigated in this Court. (*See* Rotunda & Nowak, 3.6, p. 322, n.4). Courts (including this Court) and parties have occasionally assumed federal ownership in cases involving the public lands, where such ownership was asserted and not contested. This erroneous assumption of federal ownership has led to decisions based on dicta used in its generally correct sense, but in the specific sense, may, as in this case, conflict with other decisions of this Court and thus in the specific sense, is repugnant to the Constitution.

II.

THE ISSUES RAISED ARE OF GENERAL IMPORTANCE.

The claimed ownership and assertion, since the *Kleppe* case, of jurisdiction pursuant to Article IV, § 3, cl. 2, violates a structural component of the United States Constitution. Such claimed ownership and jurisdiction deny to the people of the State of Nevada essential elements of sovereignty. Such claimed ownership and jurisdiction violate the prohibition on any involuntary reduction of a state's territory under Article IV, § 3.

In years prior to the *Kleppe* decision assertions of jurisdiction to enforce federal regulations on the public lands within the State of Nevada were based on 18 U.S.C. § 7 (Special Maritime and Territorial Jurisdiction of United States Defined). Since this Court's opinion in *Kleppe v. New Mexico*, 426 U.S. 529 (1976), that jurisdiction is claimed to rest on ownership of the public lands. No act of Congress conferring such jurisdiction on the federal courts is relied on. Jurisdiction is claimed "without limitation" under Article IV, § 3, cl. 2.

The *Kleppe* opinion has been severely criticized in the scholarly writings. Professor David E. Engdahl, in his treatise *Constitutional Federalism In A Nutshell*, Second Edition, West Publishing Co. (1987) writes of the opinion as follows:

> In 1976, with an opinion that displays darkest ignorance of what had been established for two centuries before, the Supreme Court unanimously (albeit unawares) revolutionized its doctrine under that clause. (Article IV, § 3, cl. 2) *Kleppe v. New Mexico*, 426 U.S. 529 (1976). The

> briefing on behalf of New Mexico was inept, and for its part, the Court conspicuously failed to deal with many of the relevant cases and demonstrably misunderstood others. Kleppe held that "Congress exercises the powers both of a proprietor and of a legislature over the public domain." . . . On this view, Congress can make rules for federal property which have no relation whatever to any matter otherwise of legitimate federal concern, and any such rule, being legislative in character, "necessarily overrides conflicting state laws under the Supremacy Clause." . . . as to property located within the boundaries of states, that is a profoundly novel proposition which makes a mockery of the basic purpose of enumerated powers doctrine. . . . What Kleppe really means is that over all the vast federal public domain within states, the United States has plenary, general governmental jurisdiction, and is not confined to those enumerated powers which it may exercise elsewhere in the country. It means that as to the east and the middle west, enumerated powers doctrine remains the foundation of constitutional power analysis, but as to the roughly half of the country from the Rocky Mountain states westward it has absolutely no significance at all.

Bradshaws submit that *Kleppe*, as interpreted and applied by the Ninth Circuit in this case, means that they are surrounded by lands governed as territorial or colonial holdings "without limitation" by a government whose seat of power is further away from them than the colonists were from England.

III.

THE RESOLUTION OF THIS ISSUE WOULD CONTRIBUTE TO THE DEVELOPMENT OF NATIONAL LAW: THE CLAIM OF MUNICIPAL SOVEREIGNTY AND JURISDICTION OVER THE LAND CEDED TO THE PEOPLE OF THE STATE OF NEVADA IS REPUGNANT TO THE CONSTITUTION.

The decision of the Ninth Circuit in this case relies on their prior decision in *Gardner v. United States*, 103 F.3d 886 (1997) (*Petit. for Cert. pending*). The *Gardner* decision effectively overrules the equal status of each state by purporting to establish a hierarchy of classifications of sovereignty of the states of the union based on the ownership of the lands that comprise each state prior to statehood. The Ninth Circuit distinguished *Pollard v. Hagen*, *supra* by holding that *Pollard* was based on the terms of the cessions of the land from which Alabama was formed. The Ninth Circuit held: "Before becoming a state, however, Nevada had no independent claim to sovereignty," and that, because the United States owned the lands out of which the State of Nevada was carved, Nevada cannot claim the same rights of sovereignty as Alabama. In discussing equal footing the Ninth Circuit holds that equal footing only acts to establish equality with regard to political standing and sovereignty. This holding, even if accurate, ignores the fact that the most fundamental (essential) element of sovereignty of a state is the paramount title or eminent domain over the territory of that state. Furthermore, this limitation is absurd when compared to the definition of a "State" found in this Court's decision in the *Coyle v. Smith* opinion:

> The definition of "a State" is found in the powers possessed by the original states which adopted the Constitution, a definition

> emphasized by the terms employed in all subsequent acts of Congress admitting new States into the Union.

Coyle v. Smith, 221 U.S. 559, 566 (1911) (internal citation omitted).

No other definition could exist under the constitutional scheme because inside the states of the Union the Federal Government only possessed those powers allocated to it by the Constitution. Those powers apply with equal force to each of the states.

Nevada was admitted into the Union "on an equal footing with the original states" by its very act of admission. 13 United States Statutes at Large (1864) pp. 749-750. As stated by this Court in *Pollard*:

> Whenever the United States shall have fully executed these trusts, the municipal sovereignty of the new states will be complete, *throughout their respective borders*, and they, and the original states will be upon an equal footing, in all respects whatever. We, therefore, think the United States hold the public lands within the new states by force of the deeds of cession, and the statutes connected with them, and not by any municipal sovereignty which it may be supposed they possess, or have reserved by compact with the new states, for the particular purpose. The provision of the Constitution above referred to shows that no such power can be exercised by the United States within a state. Such a power is not only

> *repugnant to the Constitution*, but it is inconsistent with the spirit and intention of the deeds of cession.

Pollard, 44 U.S. (3 How.) at 224.

The State of Nevada was not created out of territory ceded to the United States pursuant to a trust agreement such as the Northwest Ordinance. There are no terms of a trust to be executed. Accordingly, the remaining basis for this Court's decision in *Pollard* is applicable. Such power of municipal sovereignty and jurisdiction is repugnant to the Constitution. Nevertheless, today the Federal Government exercises, and the Ninth Circuit upheld, municipal sovereignty "without limitation" over the public lands of the State of Nevada. Such exercise and such holding is repugnant to the Constitution.

IV.

THE ACT OF STATEHOOD NECESSARILY IMPLIES THE CESSION OF PARAMOUNT TITLE AND EMINENT DOMAIN TO THE NEW STATE.

Upon the creation of a new state, all the powers, sovereignty, and jurisdiction of governance that may exist, except for the enumerated powers delegated to the Federal Government, lodge in the new state. Accordingly, those states as "states" held all the rights of sovereignty and power held by the original thirteen states. Once the act of statehood is completed the territory previously held by the federal government as an incidental and external power of its national sovereignty cease. Such territory becomes subject to the allocation of powers set forth in the United States Constitution. There can be no residual federal power except as enumerated in the Constitution itself. Accordingly, the act of statehood necessarily implies the cession

of municipal jurisdiction and sovereignty, *i.e.*, paramount title and eminent domain to the new state. ". . . the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a state or elsewhere, except in the cases in which it is expressly granted." *Pollard* at 223.

> To maintain any other doctrine, is to deny that Alabama has been admitted into the union on an equal footing with the original states the constitution, laws, and compact, to the contrary notwithstanding.

Pollard, 44 U.S. (3 How.) at 228-229.

> Clearly, congress could exact of the new State the surrender of no attribute inherent in her character as a sovereign, independent State, or indispensable to her equality with her sister states, necessarily implied and guaranteed by the very nature of the Federal compact.

Shively v. Bowlby, 15 U.S. 1 (1894).

In *Coyle v. Smith*, 221 U.S. 559 (1911), this Court held:

> The plain deduction from this case is that *when a new State is admitted into the Union, it is so admitted with all of the powers of sovereignty and jurisdiction which pertain to the original States*, and that such powers may not be constitutionally diminished, impaired, or shorn away by any conditions, compacts or stipulations embraced in the act under

> which the new State came into the Union *which would not be valid and effectual if the subject of congressional legislation after admission.*

Id. at 573 (emphasis added).

V.

THE RESIDUARY AND INVIOLABLE SOVEREIGNTY OF THE STATE INCLUDES PARAMOUNT TITLE AND EMINENT DOMAIN.

The Ninth Circuit acknowledges that the equal footing doctrine requires that the State of Nevada enjoy full sovereignty. Nevertheless it does not recognize what the term "sovereignty" means. In his discussions of the rights of the King of England in Book II. Chapter the Four, "Of Things." Blackstone states:

> The grand and fundamental maxim of all feodal tenure is this; that all lands were originally granted out by the sovereign, and are therefore holden, either mediately or immediately, of the crown. The grantor was called the proprietor, or *lord*; being he who retained the dominion or ultimate property of the feud or fee.

This doctrine of tenure was in affect during the colonial period. Lands in colonial America were granted by the English Crown pursuant to this doctrine. Upon the success of the revolution, it was this element of sovereignty that passed to the states. *The Quest for Tenure in the United States*, William R. Vance, 33 Yale Law Journal 248. Professor Vance traces these rights and duties in both England and the United States and concludes:

> In short the difference between lands "held by tenure" in England and those "owned" allodially in the United States is little more than a difference in words. We shall express the same idea more exactly if we say that in England today the chief lord, usually the Crown as representing the State, does retain certain legal relations with respect to land occupied by tenants in fee, but, barring distress as of common right, none of these relations have any importance save the power of retaking the land by escheat upon failure of heirs and by eminent domain, and these powers equally exist in the United States.

Accordingly, the terms "paramount title" and "eminent domain" of a state mean the absolute ownership of all lands within its boundaries except those ceded pursuant to Article I, § 8, cl. 17, and such holding is an intrinsic and fundamental (essential) attribute of sovereignty. (If the Congress may not commandeer the county sheriffs to check the background of a handgun purchaser, may the Congress nonetheless commandeer 87% of the territory of a state?) No state can be said to be sovereign that does not have this basic and essential element of sovereignty over its land. Accordingly, when the State of Nevada was admitted to the United States on an equal footing with the original states in all respects whatever, this meant with full sovereignty and included the paramount title and eminent domain of all lands within its boundaries.

VI.

THE POWERS OF CONGRESS UNDER ARTICLE IV, § 3, CL. 2, WERE CONFINED TO THE NORTHWEST TERRITORY.

The holding of the Ninth Circuit is that the State of Nevada was admitted with the condition that the federal government possessed the power to convert its *de facto* conduct of the disposal of the unappropriated lands into permanent title. Such a holding means that Nevada, unlike non-public land states, has been admitted in a diminished and impaired status. This clearly conflicts with this Court's holding in *Coyle* that the powers of sovereignty and jurisdiction which pertain to the original states may not be constitutionally diminished, impaired, or shorn away by any conditions, compacts, or stipulations.

Finally, the Ninth Circuit held that "Congress' power under the property Clause to administer *its own property* is virtually unlimited." *Kleppe*, 426 U.S. at 539. Nowhere in the *Kleppe* opinion is "its own property" defined. This expression is accurate when applied to the territory held by the United States for which this clause was intended.

The *Kleppe* opinion recites that the parties did not contest federal ownership of the land at issue in that case. The holding in *Kleppe* must be read with that distinction in mind. In the instant case, the Ninth Circuit is applying the general holding in *Kleppe* to land within a state that is not territorial land and has not been ceded pursuant to Article I, § 8, cl. 17.

The Ninth Circuit further compounds this erroneous application by implying that the *Coyle* opinion stands for the proposition that the power of congress under Article IV, § 3, cl. 2 extends to the subject of public land within Nevada. This

implication is directly contrary to what this Court's holding in *Dread Scott,* that the powers under Article IV, § 3, cl. 2 are limited to the Northwest Territory. This Court stated in *Coyle* that legislation by Congress cannot derive its force from any agreement or compact with the proposed new state. Accordingly, because Article IV, § 3, cl. 2 does not extend to land in Nevada and no agreement or compact could extend the power of Congress over a new state, there can be no legitimate claim to such power in the Federal Government. "Legislation by congress does not operate to restrict a state's legislative power in respect of any matter which is not plainly within the regulating power of Congress." Article IV, § 3, cl. 2, is not such a provision. As stated in *Dredd Scott*, "It (Article IV, § 3, cl. 2) applied only to the property which the States held in common at that time, and has no reference whatever to any territory or other property which the new sovereignty might afterward itself acquire." (Pg. 436).

Article IV, § 3, cl. 2 was directed by the founders solely to dealing with the Northwest Territory, lands that had been ceded to the Federal Government by the states prior to the adoption of the Constitution.

> The property clause was confined and was intended to be confined to the area of the states a settled by the treaty with Great Britain and have no influence on territory afterwards acquired from a foreign government.

Scott v. Sandford, 60 U.S. 393 (U.S. Mo. 1856); *Downes v. Bidwell*, 182 U.S. 244 (1901).

VII.

THE FULL GOVERNANCE TERRITORIAL POWER CANNOT EXIST WITHIN A STATE.

The United States acquired additional lands through treaty and conquest. Such lands were acquired pursuant to the treaty and war powers and were held pursuant to powers obtained by the United States as a nation as an incident of the national sovereignty, not by any provision in the Constitution. *Cross v. Harrison*, 57 U.S. 164 (1853). The *Kleppe* opinion relies on a foreshortened quote from *United States v. Gratiot*, 39 U.S. 526 (1840). The language from the *Gratiot* case relied on by the Ninth Circuit when quoted completely is as follows:

> The term "territory" as here used, is merely descriptive of one kind of property, and is equivalent to the words "lands". And Congress has the same power over it as any other property belonging to the United States; and this power is vested in Congress without limitations, and has been considered the foundation upon which *the territorial governments rest.*

Such territorial power is the full governance power. Pursuant to such power the Congress is authorized to establish an executive, a legislature, and courts. Indeed, a territorial act is itself a Constitution. Such governance power clearly ceases immediately on statehood. *American Insurance v. 356 Bales of Cotton*, (1828). In *Downes v. Bidwell* this Court states:

> The Constitution deals with states, their people and their representatives. The sole object of the territorial clause was to transfer

> to the new government the Northwest Territory and to give power to apply that territory to the objects dictated by the states. The Constitution does not extend to territories of its own force. Congress has power over territory it does not possess in the States.

Downes v. Bidwell, at 773.

VIII.

TERRITORIAL POWER CEASES UPON STATEHOOD.

Resolution of these issues would further contribute to the development of national law by reconciling a conflict between *dicta* from the *Kleppe* case and like cases which assume federal ownership of public lands and this Court's holdings concerning the extinction of federal territorial judicial power on statehood.

The judicial power of territorial courts was long ago determined to cease upon admission of a state into the Union. In *Brenner v. Porter*, 50 U.S. 235 (1850) this Court stated:

> We think it clear, therefore, that on the unconditional admission of Florida into the Union as a State, . . . the Territorial government was displaced, abrogated, every part of it; and that no power of jurisdiction existed within her limits, except that derived from the State authority, and that by force and operation of the Federal Constitution and laws of Congress; . . . The admission of the State into the Union brought the Territory under the full and complete operation of the

> Federal Constitution, and the judicial power of the Union could be exercised only in conformity to the provisions of that instrument. . . . The State authority was destructive of the Territorial; and, in connection with the establishment of the Federal jurisdiction, the organization of the government, State and Federal, under the Constitution of the Union, became complete throughout her limits. No place was left unoccupied for the Territorial organization.

This holding cannot be reconciled with the application of legislative jurisdiction pursuant to Article IV, § 3, cl. 2 over land within a state. Clearly it is territorial jurisdiction in its entirety that ceases upon statehood, not just judicial jurisdiction.

IX.

THE FEDERAL GOVERNMENT'S CLAIM OF OWNERSHIP INVOLUNTARILY REDUCES THE TERRITORY OF THE STATE OF NEVADA IN DIRECT VIOLATION OF ARTICLE IV, § 3.

Resolution of this issue would further contribute to the development of national law by vindicating the residuary and inviolate sovereignty of Nevada and its people.

As this Court held in *Printz v. United States*, 117 U.S. 430 (1997):

> It is incontestible that the Constitution established a system of "dual sovereignty." Although the States surrendered many of their powers to the new Federal Government, they retained "a residuary and inviolable

> sovereignty," The Federalist No. 39, at 245 (J. Madison). This is reflected throughout the Constitution's test, including (to mention only a few examples) the prohibition on any involuntary reduction or combination of a State's territory, Art. IV, Sec. 3, the Judicial Power Clause, Art. III, Sec. 2, and the Privileges and Immunities Clause, Art. IV, Sec. 2, which speak of the "Citizens" of the States, the amendment provision, Article V, which requires the votes of three-fourths of the States to amend the Constitution, and the Guarantee Clause, Art. IV, Sec. 4, which "presupposes the continued existence of the states and . . . those means and instrumentalities which are the creation of their sovereign and reserved rights."

(Internal citation omitted).

The Federal Government claims jurisdiction without limitation over approximately 87% of the land surface comprising the State of Nevada. Only a small fraction of that 87% is voluntarily relinquished pursuant to Article I, § 8, cl. 17. Accordingly, the Ninth Circuit's vindication of the Federal Government's claim of ownership reduces Nevada's territory in direct violation of Article IV, § 3.

X.

VINDICATION OF THE STRUCTURAL COMPONENT OF NEVADA'S STATEHOOD PROTECTS THE RIGHTS AND LIBERTIES OF THE PEOPLE OF THE STATE OF NEVADA.

Resolution of these issues would further contribute to the development of national law because the sovereignty, paramount title and eminent domain of states of the Union is a structural component of the Nation which is intended to guarantee our individual freedom. As this Court states:

> The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end itself: "Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power."

Coleman v. Thompson, 501 U.S. 1277, 1281, 111 S. Ct. 2546, 2570 (1991).

As this Court also noted in *Printz*:

> The Constitution thus contemplates that a State's government will represent and remain accountable to its own citizens. . . . The local or municipal authorities form

> distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere.

Printz, supra.

CONCLUSION

The Bradshaws are individual members of the sovereign people who need the protection of politically responsive local officials who will protect their rights and liberties. Because the land at issue herein and claimed by the United States is part of "all territory" ceded to the people of the State of Nevada and such lands were not acquired by the United States pursuant to Article I, § 8, cl. 17, or otherwise ceded to the United States by the people of the State of Nevada. It is fundamental violation of their rights as individual members of the people of the sovereign State of Nevada for the United States to exercise municipal sovereignty and jurisdiction "without limitations" over their established state and common law rights on such lands.

Respectfully submitted,

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APPENDIX A — MEMORANDUM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED JULY 18, 1997

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 96-16801

D.C. No. CV-96-00176-DWH

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

BARRY BRADSHAW; NORMA BRADSHAW,

Defendants-Appellants.

MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
David Warner Hagen, District Judge, Presiding

Submitted July 14, 1997**

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

Appendix A

Before: HUG, Chief Judge, KOZINSKI and LEAVY, Circuit Judges.

Barry and Norma Bradshaw appeal the district court's order concluding the Bradshaws had trespassed upon lands owned by the United States by allowing their cattle to graze without a permit inside the Humboldt National Forest. The Bradshaws contend the national forest lands in Nevada are actually unappropriated public lands which belong to the State of Nevada, not the United States. These contentions recently were rejected in our recent opinion in *United States v. Gardner,* 107 F.3d 1314 (9th Cir. 1997). Accordingly, the district court is

AFFIRMED.[1]

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1. We decline to consider the Bradshaw's arguments which were not presented to the district court. *See Gardner,* 107 F.3d at 1320.

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA FILED AUGUST 14, 1996

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CASE NUMBER: CV-N-96-176-DWH

UNITED STATES OF AMERICA,

Plaintiffs,

v.

BARRY BRADSHAW, et.al.,

Defendants.

AMENDED
JUDGMENT IN A CIVIL CASE

* * *

X **Decision by Court.** This action came to be considered before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Plaintiff's motion for summary judgment (#4) is **GRANTED.** Defendants are enjoined from grazing their livestock on the Humboldt National Forest until such time as plaintiff, under its laws and regulations, shall authorize such grazing; plaintiff shall have judgment against defendants for $3,429.56. Defendants shall have fifteen days from the date of

this order to remove their livestock from the Humboldt National Forest.

IT IS FURTHER ORDERED

that counter-defendant's motion to dismiss counterclaim (#4) is **GRANTED.**

APPENDIX C — ORDER (GRANTING SUMMARY JUDGMENT) OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA FILED AUGUST 8, 1996

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CV-N-96-176-DWH

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BARRY BRADSHAW, et al.,

Defendants.

ORDER

Plaintiff has moved (# 4) for summary judgment in this action for grazing fees and an injunction against what plaintiff claims is defendants' unlawful livestock grazing on federal lands under plaintiff's management and administration, and on defendants' counterclaim. Oral argument has been made and the motion is submitted for decision.

The motion is supported by affidavits which would establish unless traversed under F.R.Civ.P. 56(e), the following:

1. Plaintiff owns and through the United States Department of Agriculture's Forest Service administers and manages the Humboldt National Forest;[1]

1. The United States Forest Service has administered such lands for nearly 100 years and the Humboldt specifically since it was established in 1911. See 16 U.S.C. § 473.

2. Defendants have placed and threaten to place livestock on the Humboldt National Forest without authorization;

3. Defendants have no right to do so, their grazing permit having been canceled, which cancellation has become final because they failed to appeal it;

4. Defendants are trespassing on the Humboldt National Forest and will continue to do so unless enjoined;

5. Defendants owe plaintiff an assessment for the unauthorized grazing of $3,429.56 as of February 27, 1996.

Standard on a Motion for Summary

Summary Judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." F.R.Civ.P. 56(c). The burden of demonstrating the absence of a genuine issue of material fact lies with the moving party, *Zoslaw v. MCA Distr. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982), and for this purpose, the material lodged by the moving party must be viewed in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress and Co.*, 398 U.S. 144, 157 (1970); *Baker v. Centennial Ins. Co.*, 970 F.2d 660, 662 (9th Cir. 1992). A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the differing versions of the truth. *Admiralty Fund v. Hugh Johnson & Co.*, 677 F.2d 1301, 1306 (9th Cir. 1982)

Once the moving party presents evidence that would call

for judgment as a matter of law at trial if left uncontroverted, the respondent must show by specific facts the existence of a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, (1986).

> [T]here is no genuine issue of fact for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.

Id., 477 U.S. at 249-50 (citations omitted). "A mere scintilla of evidence will not do, for a jury is permitted to draw only those inferences of which the evidence is reasonably susceptible; it may not resort to speculation." *British Airways Board v. Boeing Co.*, 585 F.2d 946, 952 (9th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979). Moreover, if the factual context makes the nonmoving party's claim implausible, that party must come forward with more persuasive evidence than otherwise would be necessary to show there is a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *California Arch. Bldg. Prod. v. Franciscan Ceramics*, 818 F.2d 1466, 1468 (9th Cir. 1987).

Analysis

1. Ownership of the Land

Defendant has "Answered" (#17) plaintiffs motion with a lengthy legal argument that plaintiff does not own the Humboldt National Forest and therefore cannot administer and manage it.

Appendix C

Central to defendants' argument is that after Mexico ceded to the United States in 1848 the lands now in the embrace of the Humboldt National Forest, they became, by dint of this doctrine and that, unappropriated public lands of the Utah Territory and, later, the State of Nevada, open to appropriation by defendants' predecessor. Defendants offer nothing as required by F.R.Civ.P. 56(e) to show the existence of a genuine issue of material fact as to this; they argue only.

Plaintiff did not reply to defendants' "answer." None was necessary, however. Defendants' answer (#2) to plaintiffs complaint concedes the United States became owner of the land in question by treaty in 1848. When that happened, the Property Clause (U.S. Const. art. IV, § 3, cl. 2) attached to the land, which "power over the public lands thus entrusted to Congress is without limitation." *Kleppe v. New Mexico,* 426 U.S. 529, 539 (1976) (citing *United States v. San Francisco,* 310 U.S. 16, 29 (1940)). Moreover, the Supreme Court specifically has declared,

> The inclusion within a State of lands of the United States does not take from Congress the power to control their occupancy and use, to protect them from trespass and injury and to prescribe the conditions upon which others may obtain rights in them, even though this may involve the exercise of what commonly is know as the police power. "A different rule," as was said in *Camfield v. United States,* [167 U.S. 518, 526 (1897)] "would place the public domain of the United States completely at the mercy of state legislation."

Utah Power & Light Co. V. United States, 243 U.S. 389, 405 (1907).

Appendix C

Because the land belongs to plaintiff, and there is no genuine issue of material fact as to whether defendants are trespassers on plaintiff's land, the court finds they are trespassing. Summary judgment will be granted to plaintiff on the issues of trespass and defendants' obligation to pay the grazing assessments. Defendants shall have fifteen days from the date of this order to remove their livestock from the Humboldt National Forest.

2. Water Rights

Defendants have counterclaimed, asserting rights to water on federal land. Plaintiff's motion for summary judgment calls attention to defendants' silence as to whether they have complied with Nevada Revised Statutes Chapter 533, which since its enactment in 1907 has provided a comprehensive and exclusive mechanism for perfecting rights to water in Nevada. Nevertheless, defendants' "answer" continues to ignore this question, focusing only on whether this court might have subject matter jurisdiction to adjudicate defendants' water rights claim. For this they rely on a United States Court of Federal Claims order (case no. 91-1470L) which comes to the doubtful conclusion that the claims court has such jurisdiction in a case involving Nevada water.

In Nevada, the law which exclusively governs the perfection of appropriated water rights can be traced to the Act of February 26, 1907, ch. XVIII, Nev. Stat. 1907. By that act and the amendments to it, now codified in NRS Chapter 533, *all* waters in Nevada became the property of the public to be appropriated, subject to existing rights, for beneficial use. See NRS 533.030(1). It provided for a transition to protect prior appropriators. Existing rights were to be identified by the preparation and recordation of "a list of appropriation of water

according to priority" (§ 14 of the act) determined by the State Engineer after receiving sworn statements from those claiming prior appropriation. § 15 of the act. Any person feeling aggrieved by the State Engineer's initial determination was given one year from recordation in which to sue "the State Engineer and all persons having interests adverse . . . ." § 19 of the act.

Defendants make no showing, either meeting the requirements of F.R.Civ.P. 56(e) or at all, of having perfected a water right with the State Engineer on these federal lands. Thus, quite apart from whether this court has subject matter jurisdiction, defendants' counterclaim does not even state a claim. As was said in *Gardiner v. Stager,* 892 F. Supp. 1301, 1304 (D. Nev. 1995) of a position identical that taken by defendants, "[d]ismissal is appropriate here."

3. Defendants' motion (#27) for Preliminary Injunction

Following submission of the motion for summary judgment, defendants moved to enjoin plaintiff from removing defendants' livestock from the Humboldt National Forest. Because of the foregoing analysis, that motion will be denied as moot.

Accordingly, **IT IS ORDERED** plaintiff's motion for summary judgment (#4) is *GRANTED.* Defendants are enjoined from grazing their livestock on the Humboldt National Forest until such time as plaintiff, under its laws and regulations, shall authorize such grazing; plaintiff shall have judgment against defendants for $3,429.56. Defendants shall have fifteen days from the date of this order to remove their livestock from the Humboldt National Forest.

IT IS FURTHER ORDERED that counter-defendant's motion to dismiss counterclaim (#4) is *GRANTED.*

Appendix C

IT IS FURTHER ORDERED that defendants' motion for preliminary injunction (# 27) is *DENIED* as moot.

The Clerk shall enter judgment accordingly.

DATED: The 7th day of August, 1996.

s/ illegible
UNITED STATES DISTRICT JUDGE

APPENDIX D — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT IN THE MATTER OF *UNITED STATES v. GARDNER*, 103 F.3d 886 (9th Cir. 1997) FILED MARCH 25, 1997

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. CLIFFORD GARDNER; BERTHA GARDNER, *Defendants-Appellants.*	No. 95-17042 D.C. No. CV-95-00328-DWH OPINION

Appeal from the United States District Court
for the District of Nevada
David W. Hagen, District Judge, Presiding

Submitted November 6, 1996*
San Francisco, California

Filed February 25, 1997

Before: Herbert Y. C. Choy, Thomas M. Reavley,** and Edward Leavy, Circuit Judges.

Opinion by Judge Choy

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*The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

**Honorable Thomas M. Reavley, Senior United States Circuit Judge for the United States Court of Appeals, Fifth Circuit, sitting by designation.

Appendix D

SUMMARY

Real Estate/Public Lands

The court of appeals affirmed a district court judgment. The court held that the United States owns title to public lands in Nevada ceded to the United States by Mexico prior to Nevada's statehood and therefore the United States may regulate grazing on the land.

Appellants Clifford and Bertha Gardner owned a ranch in Nevada near the Humboldt National Forest. The Forest Service issued a permit allowing the Gardners' cattle to graze on certain allotments of the Humboldt National Forest. After a fire burned portions of the allotments, the Forest Service advised the Gardners that the burned areas would be closed to grazing for two years to allow the vegetation time to grow.

When the Gardners refused to remove their livestock or to pay unauthorized grazing fees, the United States filed a complaint seeking an injunction to prevent further unauthorized grazing and unauthorized grazing fees. The district court granted summary judgment in favor of the United States.

On appeal, the Gardners contended that the unappropriated lands in the state of Nevada, of which the Humboldt National Forest is a part, are not territory or other property belonging to the United States, and that therefore the Forest Service did not have jurisdiction to regulate use of the forest land or to levy fees for unauthorized activities within it. The Gardners argued that while the United States may have received the land from Mexico in the Treaty of Guadalupe Hidalgo in 1848, the United States was entitled only to hold the land in trust for the creation of future states, and was not authorized to retain the land for its own purposes. After Nevada became a state, they argued, all of the public lands within the state boundaries reverted to the state of Nevada.

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[1] The Gardners' claim that it is the duty of the United States to hold public lands in trust for the formation of future states was founded on a case dealing with land acquired by the United States from the 13 original states. That case was not applicable to this case in which the federal government was the initial owner of the land from which the state of Nevada was later carved.

[2] The United States was not required to hold the public lands in Nevada in trust for the establishment of future states. Rather, under the Property Clause, the United States can administer its federal lands any way it chooses, including the establishment of a national forest reserve.

[3] In interpreting the Equal Footing Doctrine, the Supreme Court has held that the shores of and land beneath navigable waters were reserved to the states, and were not granted by the Constitution to the federal government. The Court reasoned that new states have the same rights, sovereignty, and jurisdiction over the shores of and land beneath navigable waters as do the original states. [4] The Equal Footing Doctrine has not been extended and would not operate to reserve title to fast dry lands to individual states. [5] Moreover, the Supreme Court has held that the Equal Footing Doctrine refers to those attributes essential to a state's equality in dignity and power with other states. While a compact between a new state and the United States limiting political rights and obligations might be forbidden, a mere agreement in reference to property involves no question of equality of states. [6] The Equal Footing Doctrine would not operate to give Nevada title to the pubic lands within its boundaries.

[7] When Congress invited Nevada to join the Union in 1864, it mandated that Nevada pass an act promising that it would disclaim all right and title to unappropriated public lands within Nevada and that the lands would remain at the sole and entire disposition of the United States. [8] Since the United States already had title to those lands through the

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Treaty of Guadalupe Hidalgo, the disclaimer clause was merely a recognition of the preexisting United States title, as opposed to a grant of title from Nevada to the United States. [9] The disclaimer clause was declaratory of the right already held by the United States under the Property Clause to administer its property, and as such was constitutional.

COUNSEL

Glade L. Hall, Reno, Nevada, for the defendants-appellants.

Albert M. Ferlo, Jr., United States Department of Justice, Environment and Natural Resources Division, Washington, D.C., for the plaintiff-appellee.

William E. Schaeffer, District Attorney, Eureka, Nevada, for amicus Eureka County District Attorney.

T. David Haight, pro se, Yerington, Nevada, for amicus Chairman of the Lyon County Public Lands Planning Commission.

David Negri and Alletta Belin, Assistant Attorneys General, Santa Fe, New Mexico, for amicus State of New Mexico.

OPINION

CHOY, Circuit Judge:

Defendants-appellants Clifford and Bertha Gardner ("Gardners") appeal the summary judgment granted in favor of plaintiff-appellee United States. Gardners claim that the state of Nevada, not the United States, is the rightful owner of the public lands within Nevada. The district court granted the United States' request for an injunction against Gardners'

unauthorized grazing of livestock upon federal forest land, and also ordered Gardners to pay a fee for the unauthorized grazing. We affirm.

Factual and Procedural Background

Clifford and Bertha Gardner own the Dawley Creek Ranch in Nevada, near the Humboldt National Forest. The Humboldt National Forest is part of the National Forest System, which includes sections of "federally owned forest, range, and related lands" reserved or withdrawn from the public domain of the United States. 16 U.S.C. § 1609(a). The administration of the national forests is vested in the Secretary of Agriculture. 16 U.S.C. § 472. The Granger-Thye Act provides independent authority for the Secretary of Agriculture to issue permits for grazing on national forest land. 16 U.S.C. § 5801. Under the regulations of the Secretary of Agriculture, the grazing of livestock without Forest Service authorization on national forest lands is subject to the assessment of an "unauthorized grazing use" fee. 36 C.F.R. § 222.50(h).

In 1988, the Forest Service issued a ten-year grazing permit to Gardners, which allowed a portion of Gardners' cattle to graze on certain allotments of the Humboldt National Forest subject to the terms and conditions of the permit. A clause in the permit stated:

> It is fully understood and agreed that this permit may be suspended or cancelled, in whole or in part, after written notice, for failure to comply with any of the terms and conditions specified in Parts 1, 2, and 3 hereof, or any of the regulations of the Secretary of Agriculture on which this permit is based, or the instructions of Forest officers issued thereunder . . . .

Immediately above the signature line on the permit are the words: "I HAVE REVIEWED AND ACCEPT THE TERMS OF THIS PERMIT." Cliff Gardner signed the permit.

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In August of 1992, a fire burned over 2,000 acres of the Mica C & H and Mica Creek Addition Allotments. The Forest Service and the Nevada Department of Wildlife reseeded the majority of the burned area in October and November of 1992. The Humboldt National Forest Land and Resource Management Plan specifies that reseeded areas must not be grazed by livestock for a two year period, to give the vegetation time to grow. Accordingly, in September 1992, the Forest Service advised Gardners that the burned area would be closed to grazing during 1993 and 1994. Gardners did not graze livestock in the affected area during 1993.

On May 13, 1994, Gardners sent a letter to the Forest Service stating that they intended to resume grazing on the burned area within 3 days. On May 18, 1994, the Forest Service observed Gardners' livestock grazing on the burned area. On May 19, 1994, the Forest Service hand-delivered a letter to Gardners advising that they were violating the terms and conditions of the permit by grazing cattle in the burned area, and requiring that the livestock be removed from the burned area by May 22, 1994. Gardners did not remove the livestock.

The Forest Service subsequently revoked Gardners' permit, and told Gardners that they would be billed for the unauthorized grazing at a rate of $6.12 per "head month." Additionally, the Forest Service informed Gardners that the cancellation decision could be contested through an administrative appeal. Gardners opted not to administratively appeal the decision.

Gardners continued to graze livestock on the burned area throughout the 1994 grazing season. Gardners also refused to pay the fee for the unauthorized grazing, assessed at $4,473.72, to the Forest Service.

On May 23, 1995, the United States filed a complaint seeking an injunction against Gardners to prevent further unauthorized grazing of Gardners' livestock in the Humboldt National

Forest. The United States also sought damages based on Gardners' unauthorized use of the national forest for grazing. On October 4, 1995, the district court granted the United States' motion for summary judgment. The district court enjoined Gardners from further unauthorized grazing and ordered them to remove their livestock from the forest area. The court also ordered Gardners to pay $7,030.41 to the United States as a fee for unauthorized grazing as of September 8, 1995.

Analysis

Gardners do not contest that they grazed livestock on forest land without a permit or other authorization from the Forest Service, nor do they contest the amount of the fee assessed. Instead, Gardners assert that the unappropriated lands in the state of Nevada, of which the Humboldt National Forest is a part, are not territory or other property belonging to the United States, and that therefore the Forest Service does not have jurisdiction to regulate use of the forest land or to levy fees for unauthorized activities within it.

This court reviews a grant of summary judgment de novo. *Jesinger v. Nevada Fed. Credit Union*, 24 F.3d 1127, 1130 (9th Cir. 1994).

I. The United States' Title to Federal Land in Nevada[1]

Gardners argue that grazing their livestock in the Humboldt National Forest without a permit does not constitute trespass because the federal government does not have title to the land

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[1]An Amicus Brief was filed on behalf of the states of New Mexico, Alaska, Maine, Montana, Oregon, Vermont, and, significantly, Nevada supporting the position of the United States in this case. Additionally, a federal district court in Nevada has held that title to the public lands within Nevada's boundaries rests in the United States. *United States v. Nye County*, 920 F. Supp. 1108 (D. Nev. 1996).

on which the grazing took place. Gardners contend that, while the United States may have received the land in question from Mexico in the Treaty of Guadalupe Hidalgo in 1848, the United States was entitled only to hold the land in trust for the creation of future states, and was not authorized to retain the land for its own purposes. After Nevada became a state, Gardners argue, all of the public lands within the state boundaries reverted to the state of Nevada.[2]

The United States and Mexico signed the treaty of Guadalupe Hidalgo in 1848. In that treaty, Mexico ceded land that includes the present-day state of Nevada to the United States. 9 Stat. 922 (1848); *see also Sparrow v. Strong*, 70 U.S. (3 Wall.) 97, 104 (1865) ("The Territory, of which Nevada is a part, was acquired by Treaty."). The language of the Treaty itself refers to the land ceded by Mexico to the United States as "territories previously belonging to Mexico, and which remain for the future within the limits of the United States." 9 Stat. 922, 929 (1848). Courts in the United States have uniformly found that title to the land first passed to the United States through the Treaty. *See, e.g., United States v. California*, 436 U.S. 32, 34 n.3 (1978) (stating that, under the Treaty, "all nongranted lands previously held by the Government of Mexico passed into the federal public domain"); *Cappaert v. United States*, 426 U.S. 128, 131 (1976) (stating that a limestone cavern located in Nevada is "situated on land owned by the United States since the Treaty of Guadalupe Hidalgo in 1848").

[1] The claim by Gardners that it is the duty of the United States to hold public lands in trust for the formation of future

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[2]Gardners point out that Nevada recently passed a statute claiming ownership over all public lands within its boundaries. Nev. Rev. Stat. 321.5973. Gardners claim that the passage of this law further demonstrates that title to the public lands in Nevada properly rests in the state, not the federal, government. Gardners fail to note, however, that the Nevada statute by its own terms excludes national forest lands from the public lands claimed by Nevada. *See* Nev. Rev. Stat. § 321.5963.

states is founded on a case dealing with land acquired by the United States from the thirteen original states. In that case, *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845), the Supreme Court discussed the extent of the United States' authority over lands ceded to it from Virginia and Georgia to discharge debt incurred by those states during the Revolutionary War. The Court stated that the United States held this land in trust for the establishment of future states. *Id.* at 222. Once those new states were established, the United States' authority over the land would cease. *Id.* at 221-23. This decision was based on the terms of the cessions of the land from Virginia and Georgia to the United States. Before becoming a state, however, Nevada had no independent claim to sovereignty, unlike the original thirteen states. Therefore, the same reasoning is not applicable to this case, in which the federal government was the initial owner of the land from which the state of Nevada was later carved.

Thus, as the United States has held title to the unappropriated public lands in Nevada since Mexico ceded the land to the United States in 1848, the land is the property of the United States. The United States Constitution provides in the Property Clause that Congress has the power "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2. The Supreme Court has consistently recognized the expansiveness of this power, stating that "[t]he power over the public land thus entrusted to Congress is without limitations." *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976); *United States v. San Francisco*, 310 U.S. 16, 29 (1940). *See also Alabama v. Texas*, 347 U.S. 272, 273 (1954); *United States v. California*, 332 U.S. 19, 27 (1947); *Gibson v. Chouteau*, 80 U.S. (13 Wall.) 92, 99 (1871); *United States v. Gratiot*, 39 U.S. (14 Pet.) 526, 537 (1840). Moreover, the Supreme Court has noted that Congress "may deal with [its] lands precisely as an ordinary individual may deal with his farming property. It may sell or withhold them from sale." *Light v. United States*, 220 U.S. 523, 536 (1911) (internal

quotation marks and citation omitted). Indeed, the establishment of a forest reserve by Congress is a "right[ ] incident to proprietorship, to say nothing of the power of the United States as a sovereign over the property belonging to it." *Id.* at 537.

[2] The United States, then, was not required to hold the public lands in Nevada in trust for the establishment of future states. Rather, under the Property Clause, the United States can administer its federal lands any way it chooses, including the establishment of a national forest reserve.

II. The Equal Footing Doctrine

Gardners argue that, under the Equal Footing Doctrine, a new state must possess the same powers of sovereignty and jurisdiction as did the original thirteen states upon admission to the Union. Because the federal government owns over eighty percent of the land in the state of Nevada, Gardners argue, Nevada is not on an equal footing with the original thirteen states.[3] Gardners claim that Nevada must have "paramount title and eminent domain of *all* lands within its boundaries" to satisfy the Equal Footing Doctrine.

[3] The meaning of the Equal Footing Doctrine is discussed in *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845). In that case, the Supreme Court held that the shores of and land beneath navigable waters were reserved to the states, and were not granted by the Constitution to the federal government. *Id.* at 229. New states, the Court reasoned, have the

[3]For example, in New Hampshire the federal government owns just under thirteen percent of the land. The federal government owns between two and seven percent of the land within the borders of nine of the other original thirteen states. In Connecticut, New York and Rhode Island, less than one percent of the land is owned by the federal government. Bureau of Land Management, U.S. Department of the Interior, Public Land Statistics 1993, at 5, Table 3 (September 1994).

same "rights, sovereignty, and jurisdiction" over the shores of and land beneath navigable waters as do the original states. *Id.*[4]

[4] However, the Supreme Court has declined to extend the Equal Footing Doctrine to lands other than those underneath navigable waters or waters affected by the ebb and flow of the tides. In *Scott v. Lattig*, 227 U.S. 229, 244 (1913), the Supreme Court held that title to an island within a stream did not pass to the state of Idaho, but instead was retained by the United States. The Court stated that because the island "was not part of the bed of the stream or land under the water . . . its ownership did not pass to the State or come within the disposing influence of its laws." *Id.* The Court went on to note that the island was "fast dry land, and therefore remained the property of the United States and subject to disposal under its laws . . . ." *Id.* Sixty years later, the Supreme Court characterized its decision in *Scott* as holding that the rule in *Pollard's Lessee* "does not reach islands or fast lands located within such waters. Title to islands remains in the United States, unless expressly granted along with the stream bed or otherwise." *Texas v. Louisiana*, 410 U.S. 702, 713 (1973). The Equal Footing Doctrine, then, does not operate to reserve title to fast dry lands to individual states.

[5] Moreover, Supreme Court has long held that the Equal Footing Doctrine refers to "those attributes essential to [a state's] equality in dignity and power with other States." *Coyle v. Oklahoma*, 221 U.S. 559, 568 (1911). The Court has noted that a new state enters the Union "in full equality with all the others," and that this equality may forbid a compact between a new state and the United States "limiting or qualifying political rights and obligations." *Stearns v. Minnesota*, 179 U.S. 223, 245 (1900). However, "a mere agreement in reference to property involves no question of equality of

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[4]The Supreme Court later described the Equal Footing Doctrine as applicable to "all lands beneath waters subject to the tide's influence." *Phillips Petroleum Co. v Mississippi*, 484 U.S. 469, 484 (1988).

status." *Id.* The Court has observed that "[s]ome States when they entered the Union had within their boundaries tracts of land belonging to the Federal Government; others were sovereigns of their soil." *United States v. Texas*, 339 U.S. 707, 716 (1950). While these disparities may cause economic differences between the states, the purpose of the Equal Footing Doctrine is not to eradicate all diversity among states but rather to establish equality among the states with regards to political standing and sovereignty. *Id.*

[6] The Equal Footing Doctrine, then, applies to political rights and sovereignty, not to economic or physical characteristics of the states. Moreover, the Equal Footing Doctrine applies primarily to the shores of and lands beneath navigable waters, not to fast dry lands. Therefore, the Equal Footing Doctrine would not operate, as Gardners argue, to give Nevada title to the public lands within its boundaries.

III. The Validity of Nevada's "Disclaimer Clause"

[7] When Congress invited Nevada to join the Union in 1864, it mandated that the Nevada constitutional convention pass an act promising that Nevada would "forever disclaim all right and title to the unappropriated public lands lying within said territory, and that the same shall be and remain at the sole and entire disposition of the United States . . . ." Nevada Statehood Act of March 21, 1864, 13 Stat. 30, 31 § 4. The state constitutional convention did so. Ordinance of the Nevada Constitution.[8]

Gardners claim that this clause is invalid and unconstitutional as an attempt to divest Nevada of its title to the unap-

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[8]After the submission of this case, Gardners filed a document containing "Supplemental Authorities" pursuant to Fed. R. App. P. 28(j). In that document, Gardners discuss, *inter alia*, the rhetoric of the Disclaimer Clause. The disposition of this case is not altered by that discussion or by any of the other "Supplemental Authorities" presented by Gardners.

propriated lands within its boundaries. Gardners cite to *Van Brocklin v. Tennessee*, 117 U.S. 151, 167 (1886) for the premise that such disclaimer clauses "are but declaratory, and confer no new right or power upon the United States." Therefore, Gardners argue, Nevada could not have given the United States title to the public lands within its boundaries through the disclaimer clause.

[8] Gardners are correct in their argument that the disclaimer is declaratory. However, the United States did not need the disclaimer clause to gain title to the public lands in Nevada. The United States already had title to those lands through the Treaty of Guadalupe Hidalgo, and the disclaimer clause was merely a recognition of the preexisting United States title, as opposed to a grant of title from Nevada to the United States.

[9] As aforementioned, Congress' power under the Property Clause to administer its own property is virtually unlimited. *See, e.g., Kleppe*, 426 U.S. at 539. Indeed, the United States retains title to the public lands within states such as Nevada not due to "any agreement or compact with the proposed new State," but rather "solely because the power of Congress extend[s] to the subject." *Coyle*, 221 U.S. at 574. The disclaimer clause, then, is declaratory of the right already held by the United States under the Constitution to administer its property, and as such is valid under the United States Constitution. *Van Brocklin*, 117 U.S. at 167.

IV. The Tenth Amendment

Gardners argue that federal ownership of the public lands in Nevada is unconstitutional under the Tenth Amendment. Such ownership, they argue, invades "core state powers reserved to Nevada," such as the police power.[6]

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[6]The opinion of the district court contained no ruling on this issue.

Appendix D

Federal ownership of the public lands within a state does not completely divest the state from the ability to exercise its own sovereignty over that land. The state government and the federal government exercise concurrent jurisdiction over the land. In *Kleppe v. New Mexico*, the Supreme Court held that the Wild Free-roaming Horses and Burros Act was not an impermissible intrusion on the sovereignty of New Mexico. 426 U.S. 529 (1976). In so doing, the Court noted:

> Absent consent or cession a *State undoubtedly retains jurisdiction over federal lands within its territory*, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause. [citations omitted] And when Congress so acts, the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause.

Id. at 543 (emphasis added). Indeed, a state may enforce its criminal and civil laws on federal land "so long as those laws do not conflict with federal law." *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 580. The state of Nevada, then, is not being unconstitutionally deprived of the ability to govern the land within its borders. The state may exercise its civil and criminal jurisdiction over federal lands within its borders as long as it exercises its power in a manner that does not conflict with federal law.

V. Guarantee Clause, Equal Protection, and Political Accountability Claims

Gardners argue that the retention by the United States of the unappropriated public lands within the state of Nevada violates the Guarantee Clause of the United States Constitution. Gardners also contend that federal ownership of the public lands in Nevada denies them equal protection of the laws under the Fifth Amendment and fails the "political accountability test." As it does not appear that these issues were

raised before the district court, this court will not consider them. *See, e.g., Singleton v. Wulff*, 428 U.S. 106, 120 (1976) ("It is the general rule . . . that a federal appellate court does not consider an issue not passed upon below.").

Conclusion

We AFFIRM the judgment of the district court.